Supreme Court of the United States,

OCTOBER TERM, 1901.

No. 177.

EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, N. Y., Plaintiff in Error, vs. DAVID W. EBAUGH, Defendant in Error.	In Error to the Supreme Court of the State of South Carolina.

Petition for Rehearing.

Now comes the Eastern Building and Loan Association, plaintiff in error, and respectfully moves and petitions this Honorable Court for a rehearing of the above entitled cause for the following reasons, to wit:

I.

Because the Court in its opinion handed down in this case upon April 7, 1902, erroneously holds and decides that the finding of the Referee in the Court of Common Pleas of South Carolina interpreting and construing the Laws of New York and the Articles of Association and By-Laws of the Eastern Building and Loan Association was a finding of fact and, as such, conclusive and binding upon this Court as to the Laws of New York, when as a matter of law and upon authority it should be held:

(*a.*) That the construction by the said Referee of the Statutes, Laws and Judicial Decisions of New

York, proven as facts by undisputed evidence in the case, was a mere conclusion of law, based upon undisputed documentary evidence and not in any sense binding upon the Courts of South Carolina or upon this Court.

(*b.*) That any construction by the Referee in the trial Court, or by the Courts of South Carolina, of the Laws of New York, proven as undisputed facts by undisputed evidence in the trial Court, must conform to and be in harmony with the construction of said laws by the Courts of New York in order to comply with the requirements of Article IV., Section 1 of the Constitution of the United States.

II.

Because the Court in its opinion herein falls into manifest error in this, that it confuses the distinction between facts that must be proven as such in the State Court, and which were proven as such by the undisputed and uncontradicted evidence in this case, and matters of law; that is, mere legal conclusions based upon such facts and which are reviewable in this Court.

III.

Because it appears from the record that the Laws of New York were proven as facts by undisputed evidence upon the trial of the case in the Court of Common Pleas of South Carolina, and that the only pretended finding of fact by the Referee as to such laws was a conclusion of law and not a finding of fact, being merely his construction of the Laws of New York; and because such a construction of a State Law proven as a fact is not a finding of fact but a mere legal conclusion not binding upon this Court.

IV.

Because although it is the undisputed law that what was matter of fact in the State Court is mat-

ter of fact in this Court upon a writ of error to the State Court, yet this does not justify and will not sustain as being matter of fact the mere construction by the State Court of the Laws of New York, such Laws having been proven as facts and not being disputed by any testimony in the trial Court, and there being no finding that they are not facts as so proven.

V.

Because the Court in its opinion herein confuses the necessity of proving as facts the Laws of New York in the Courts of South Carolina, which necessity we concede and which proof was made by undisputed evidence, with the attempt of the Referee of the South Carolina Court to make it appear that his construction of the Laws of New York was a finding of fact, when, as a matter of law, such finding was a mere conclusion of law based upon undisputed documentary evidence, and not a finding of fact in any sense whatever.

VI.

Because the Court in its opinion falls into error in the application of the doctrine laid down by Chief Justice Waite in Chicago & Alton Railroad *v.* Wiggins Ferry Co. (119 U. S., 615), overlooking the fact that the Laws of New York were proven as facts in the case at bar by undisputed evidence, and that the Wiggins Ferry case gives no countenance to the doctrine that the construction of such laws by the trial Court after they have been proven, is a finding of fact binding upon this Court.

We respectfully submit that a leading English case will make clear to the Court the difference between a finding of fact and a conclusion of law in the matter of foreign laws forming an integral part of a contract calling for enforcement (Copin *v.* Adamson, 9 L. R. Exch., 345; 31 L. T. (N. S.), 242; 43 L. J. Exch., 161).

VII.

We most respectfully submit that this petition is not filed merely as a matter of form, but because we believe that the opinion of the Court herein is erroneous in point of law and in contravention of the plain meaning and intent of Article IV., Section 1, of the Constitution of the United States.

We therefore submit a brief and argument in support of this petition, and earnestly ask that this Court, and the able and impartial Justice thereof who delivered the opinion of the Court, give to such brief and argument full consideration, and, if compatible with the justice of the case, direct a reargument upon the question whether or not the finding of the Referee in the Court of Common Pleas of South Carolina was a finding of fact binding upon this Court, or a mere conclusion of law erroneously designated as a finding of fact and not binding upon this Court for any purpose whatsoever.

And your petitioner prays that an order may be made for a rehearing of the argument in this case on a day to be appointed and at a time set by the Court upon the point above stated, and upon such other points as the Court may direct.

Respectfully submitted,

WM. HEPBURN RUSSELL,
WM. BEVERLY WINSLOW,
Counsel for Plaintiff in Error.

I hereby certify that this petition for a rehearing is presented in good faith, and that I believe it is based on meritorious grounds.

WM. HEPBURN RUSSELL,
Counsel for Petitioner.

BRIEF AND ARGUMENT.

In support of the foregoing petition for a rehearing in this case, we submit the following brief and argument, and earnestly request the full and careful consideration thereof by this Honorable Court.

I.—This Court, in its opinion, rests its decision on the proposition that the plaintiff in error, by its agents and its circulars induced defendant in error to become a stockholder upon the representation that the stock would mature (that is, attain its par value of $100 per share) in 78 months upon 78 payments of seventy-five cents per share per month, and that the Referee and the South Carolina Court of Common Pleas found *as matter of fact* that the law of New York did not prevent the making and enforcement of such a contract of membership as between the corporation and its members. Therefore, says this Court, what was matter of fact in the Court below is matter of fact here, and this Court holds itself bound by the alleged findings of fact in the State Court, and hence the judgment is affirmed. The exact language of the opinion on this point is as follows:

"It will be observed, therefore, that the case was presented to the Supreme Court of South Carolina with the facts found by the trial Court as follows: (1) that the plaintiff in error had made a positive promise that the stock of defendant in error would mature in seventy-eight weeks (*sic*) (months); (2) under the assurance of that promise the defendant had subscribed for the stock and had performed in good faith all obligations on his part; (3) under such circumstances it was the law of New York that plaintiff in error could not be heard to say that its promise was *ultra vires*. And the Court decided that such findings of fact were conclusive upon it. The case is presented here under like conditions. This is a writ of error to the State court, and whatever was a question of fact there is a question of fact here."

We concede that if the finding of the Referee and of the trial Judge below is *a finding of fact upon a matter on which there was a conflict of testimony*, then the finding was conclusive upon the Supreme Court of South Carolina and is conclusive in this Court.

But, on the other hand, we insist that if it is shown by the record that the law of New York was proven by undisputed evidence, that there was no question *as matter of fact* as to what the law of New York so proven was; that no question involving the doctrines of *ultra vires* was necessary to the decision of the case, and that the alleged finding of fact by the Referee was a mere construction of certain New York decisions relating to the doctrine of *ultra vires* as matter of law and not of fact, then this Court is not bound by such finding merely because it was denominated in the Court below a "finding of fact."

That the record shows the finding to have been a mere conclusion of law and not a finding of fact, is, we submit, a matter of absolute demonstration. The *statutes* of New York under which the complainant in error was incorporated were given in evidence, and no denial was made that they were the statutes of New York governing such corporations as the Eastern Building and Loan Association (Record, p. 26, par. 37; also Rec., pp. 31–38). If there had been, it would have been a question of law, not of fact A question for the Court not the Referee.

Post *v.* Supervisors, 105 U. S., 667.

There was no evidence to contradict these statutes and not a single decision construing them was offered in evidence by defendant in error. The only decisions offered relating to these statutes and to corporations like the plaintiff in error organized under them were the decisions given in evidence by the plaintiff in error, and the language, meaning and effect of which as to the New York law are beyond question or controversy. Hence there was no conflict of evidence

as to the law of New York governing building and loan associations and their stockholders. Plaintiff in error produced oral testimony showing the construction of these statutes by the courts of New York (Rec., pp. 41, 42), and no contradictory or conflicting evidence was offered by the defendant in error. Plaintiff in error also offered in evidence certain decisions of the courts of New York construing these statutes, fixing the rights of building and loan associations and their members under the laws of New York (Rec., pp. 38–41; also Rec., p. 15, par. 21). These decisions were *O'Malley* v. *People's Building, Loan and Savings Assn.*, 92 Hun, N. Y., 572; *Englehardt* v. *Fifth Ward Assn.*, 148 N. Y., 281; *People* v. *Lowe*, 117 N. Y., 175; *Concordia Assn.* v. *Read*, 93 N. Y., 474.

There was no pretense that these decisions had been denied, reversed or overruled. No decisions in conflict with them were offered in evidence by the defendant in error. Therefore, the law of New York, as established by the terms of the Acts of 1851 and 1875, and as construed by the cases above referred to, was not disputed or contradicted by any evidence given in the case, but was and is conclusively proven as a fact by undisputed testimony, and so much even the finding of the Referee in the Court of Common Pleas of South Carolina concedes (Rec., pp. 26, 27). These statutes and these cases relate to building and loan associations and their relations with their members, and fix and settle the New York law beyond question, doubt or difficulty so far as the relative rights and obligations of such associations and their members are concerned.

Defendant in error, as we have stated, offered no evidence in conflict with these statutes or decisions, but did offer and give in evidence three decisions of the Court of Appeals of New York having no bearing whatever on the New York statutes given in evidence, or upon the law of New York as to the status of building and loan associations and their members. The decisions so given in evidence by

the defendant in error were *Whitney Arms Co* v. *Barlow*, 63 N. Y., 62; *DeGraaf* v. *American Linen Thread Co.*, 21 N. Y., 124; *Diamond Match Co.* v. *Roeber*, 106 N. Y., 473. These cases bear entirely upon the doctrines of *ultra vires* in relation to corporate contracts made with persons dealing with the corporation at arm's length. They do not even remotely bear on the relations of members of a purely mutual corporation to each other and to the corporation. They do not touch or affect the contract of corporate membership, nor attempt to apply the doctrines of *ultra vires* thereto. We reviewed these cases in detail in our original brief in this case, and to that discussion we venture to again refer the Court (Brief for plaintiff in error, pp. 71–72). We insist that an examination of these cases will show that they prove absolutely nothing as a *matter of fact* upon any issue in this case and that as matter of law they have no bearing upon it. The only finding of the Referee in the trial Court based on these cases is contained in the following paragraph, which we quote from the Referee's findings:

"I find as a matter of fact that the law of New York is that where a corporation enters into a contract that is in excess of its charter powers or is unauthorized by law, it will, nevertheless, be bound to perform its agreement as contained in the contract if it suffers the other party to perform his agreement and receives the benefits and retains them" (Rec., pp. 25, 26).

We do not deny the elementary legal doctrine thus found as a fact by the learned Referee. But, what bearing has such a finding, whether of law or fact, upon the issues in the case at bar?

It seems that this Court, like the courts of South Carolina, has overlooked and misconceived the only point in controversy. That point is, whether or not a stockholder in a purely mutual corporation can withdraw more than his *pro rata* share of the

capital stock and more than he has contributed thereto when there are no profits out of which such surplus can be paid, and when he himself has been for years a constituent part of the corporation, exercising all the rights of membership and with no equities superior to those of other members. This is not a question of *ultra vires*. It is a question of the meaning and effect of the corporate charter and by-laws, the statutes of New York regulating such corporations, and the duties and obligations of the corporate members. The law of New York upon this question was proven by undisputed testimony, and there is no finding of fact in conflict with that testimony. No "finding of fact" by a referee in South Carolina can have any bearing upon the unequivocal language of the governing statutes and the undeniable meaning of the decisions which construe them.

It is certainly a novel proposition that a statute, and decisions construing that statute, having been given in evidence and not being disputed, that the construction of such statute by a referee in the trial Court is a finding of fact binding upon the Appellate Courts, and consequently binding upon this Court on a writ of error.

The findings of fact by the Referee to the effect that the association promised to pay the defendant in error $100 per share upon his stock at the expiration of seventy-eight months, and that he relied upon this promise, is not a finding that involves any liability upon the part of the association to the defendant in error different from its obligation to all its other members. It is a manifest absurdity to say that a purely mutual corporation can make an agreement that it will pay all its stockholders who contribute in seventy-eight months, $58.50 per share, each $100 upon each share at the expiration of the seventy-eight months period. It takes profits to pay dividends to stockholders; if there are no profits, there can be no dividends, and any attempt to guarantee dividends to stockholders in a purely mutual

corporation is an absurdity in fact and null and void in law.

The Supreme Court of South Carolina by its decision and this Court by the affirmance thereof in effect hold that the members of a corporate partnership, all of whom enter into a corporation upon the same terms can each draw out of the corporate funds nearly twice as much as they have contributed or as those funds in the aggregate amount to. This Court seeks to rest this extraordinary conclusion upon a finding of fact by a referee that the contract with the corporate members to so pay them for their stock, even if *ultra vires*, is not unenforcible under the law of New York. This finding, as we have shown, is a mere conclusion of law and an erroneous application of certain New York cases which have no possible bearing upon the present controversy.

Against this finding are repeated decisions of the courts of New York directly applicable to the status of the Eastern Building and Loan Association and its members, and the relevant statutes of New York proven as fact and as such undisputed upon the face of the record in this case. Therefore, we think that this case should be decided upon its merits, and that Article IV., Section 1, of the Constitution of the United States, is directly applicable upon the facts to the case at bar.

So far as the *Wiggins Ferry Co.* case (119 U. S., 615), is concerned, we submit, with all due deference, that it is not an authority in support of the opinion of the Court in the case at bar. In the *Wiggins Ferry Co.* case, it is expressly held, that "the constitutional requirement that 'full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State,' implies that the public acts of every State shall be given the same effect by the courts of another State that they have by law and usage at home." It is also held in that case that "whenever it becomes necessary, under Article IV., Section 1, of the

Constitution for a court of one State, in order to give faith and effect to a public act of another State, to ascertain what effect it has in that State, the law of the other State must be proved as a fact." The undoubted meaning of this doctrine is, that as the State courts do not take judicial notice of the statutes and judicial decisions of other States, such statutes and judicial decisions, when relied upon under the full faith and credit clause of the Federal Constitution, must be given in evidence, and that when so given in evidence they have and must have the same effect given to them by the courts of the State in which they are given in evidence that they have by law and usage at home.

Elmendorf *v.* Taylor, 10 Wh., 152, 159.
Hilton *v.* Guyot, 159 U. S., 113, 194.

This Court, in its opinion in this case, cites the *Wiggins Ferry Co.* case to the proposition that it is a matter of fact for the Referee to determine what the law of New York is. This would be true only in the event that the statutes of New York, admittedly valid as such, had not been given in evidence; that the written decisions construing these statutes had not been given in evidence, and that the only testimony as to the laws of New York was oral. Surely it cannot be claimed that when the statutes of a State are given in evidence in exact accord with the requirements of the *Wiggins Ferry Co.* case, and the decisions construing those statutes are also given in evidence, being thus absolutely proven as facts, undisputed, unquestioned and unqualified, that a referee, by misstating either the language of those statutes or the effect of the decisions construing them, can deprive a party litigant of the protection of Article IV., Section 1 of the Constitution of the United States.

Lloyd *v.* Matthews, 155 U. S., 222, 227.

Stated in the form of a logical syllogism the fallacy of such reasoning seems to us apparent at a

glance. It will not do to say, *first*, that the Constitution of the United States requires that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State; *second*, that this means "that the public acts of every State shall be given the same effect by the Courts of another State that they have by law and usage at home"; and, *third*, that after such acts and all decisions construing them have been given in evidence as undisputed facts in a case, a Referee can, by finding as a fact that the law of the given State is other than that contained in the statutes and decisions, deprive this Court of the right to review the question upon its merits and to enforce the full faith and credit clause of the Constitution of the United States in accordance with the plain meaning of its terms.

This is the exact logical result of the opinion in the case at bar, and we submit that it cannot be sustained either upon legal or logical principles.

II.—In support of the arguments just set forth, we submit the following points of law and authorities sustaining the same:

A finding of fact "that there was no such cotenancy between the plaintiff and defendants in the mine in controversy as entitled the plaintiff to an account" is a mere legal inference, not a finding of fact.

Kahn *v.* Smelting Co., 102 U. S., 641, 646.

The finding to be conclusive must be on the point in controversy.

Craig *v.* Missouri, 4 Pet., 428, 429.

A statement in a finding by the Court that "no set-off or recoupment * * * against this claim exists" following an explicit finding of facts which establish a set-off, is merely a conclusion and does not control or affect the facts so found.

United States *v.* Harris (C. C. A.), 77 Fed., 821.

So in the case at bar, the finding of the facts as to the contract of membership, the corporate charter and by-laws, the stock certificates, etc., establishes the proposition that defendant in error is not entitled to recover, and a mere legal conclusion embodied in the findings of the trial Court is without weight or authority here. Surely the rule is well settled that the construction of written instruments as to their legal effect is one of law for the Court, not of fact for a jury or referee, and hence the Referee's construction of the New York statutes and decisions is not a finding of fact binding as such in the Appellate Courts.

In short, when a foreign law is proved as a fact, such proof is not made to the jury but to the Court. The law being proven as a fact, its construction and effect are matters of law for the Court, not of fact for a jury or referee. Consequently, any findings purporting to be findings of fact as to such law are wholly without binding effect upon an Appellate Court:

"In regard to foreign laws, the established doctrine now is, that no court takes judicial notice of the laws of a foreign country, but they must be proved as facts. And the better opinion seems to be that this proof must be made to the Court, rather than to the jury. 'For,' observes Mr. Justice Story, 'all matters of law are properly referable to the Court, and the object of the proof of foreign laws is to enable the Court to instruct the jury what, in point of law, is the result of the foreign law to be applied to the matters in controversy before them. The Court are, therefore, to decide what is the proper evidence of the laws of a foreign country; and when evidence is given of those laws, the Court are to judge of their applicability, when proved, to the case in hand.'"

1 Greenleaf on Evidence (16th Ed.), § 486.

Story on Conflict of Laws, § 638.

Minor on Conflict of Laws, § 213.

The statutes of the United States having provided how the laws of one State shall be authenticated when offered in evidence in another State, the proof of such laws is made by giving them in evidence so authenticated. When so proven their effect as laws of a sister State becomes a question of law for the Court, not of fact for a referee, and the Federal Constitution requires that they be given the same effect that they have in the State of their enactment, when, as in the case at bar, they form an integral part of a contract of corporate membership made and performable in the State of the corporate *situs*.

1 Greenleaf on Evidence (16th Ed.), § 6 *b*.

1 Greenleaf on Evidence (16th Ed.), §§ 486, 489.

While the law of one State must be proved in another as a fact (*Lloyd* v. *Matthews*, 155 U. S., 227), yet it is also true that when a statute is given in evidence and decisions construing it are also given in evidence, the fact is proven and the legal effect of the fact is then a question of law for the tribunal. It is not for a jury or a referee to change the law of New York by finding as a fact that such law is not the law. The Court in such a case could not take judicial notice of the law until proven, but once proven as a fact the meaning and effect of the law and its construction by the courts of the State of its enactment becomes a question of law, not of fact.

Elmendorf *v.* Taylor, 10 Wh., 152, 159.

"Whether a seeming act of the Legislature is or is not a law, is a judicial question to be determined by the Court, not a question of fact to be tried by a jury."

Post *v.* Supervisors, 105 U. S., 667.

Town of South Ottowa *v.* Perkins, 94 U. S., 260, 267.

"The judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus no court in the universe, which professed to be governed by principle, would, we presume, undertake to say that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle the construction given by this court to the Constitution and laws of the United States is received by all as the true construction; on the same principle the construction given by the courts of the several States to the legislative acts of those States is received as true, unless they come in conflict with the Constitution, laws and treaties of the United States."

Marshall, C. J., in Elmendorf *v.* Taylor, 10 Wh., 152, 159.
Hilton *v.* Guyot, 159 U. S., 113, 194.

And in the case of *Elmendorf* v. *Taylor*, the great Chief Justice, having laid down the law as above quoted, proceeded to review the Kentucky decisions and determine, as matter of law, what the Kentucky law was. This was all the Referee and State Court could do in the case at bar. If they erred in determining and applying the law of New York, if they did not give to the New York statutes the same meaning, construction and effect given to them by the courts of New York, then this Court has full power to review the decision.

The error into which this Honorable Court in its opinion seems to have fallen is, that it has accepted the *ipse dixit* of the Supreme Court of South Carolina that the Referee's finding was a finding of fact,

when in truth it was a mere legal inference; and this being so, it seems to us that a rehearing should be granted in this case in order that the case may be heard and determined upon its merits. The rule in both the Federal and State Courts is, that when a State statute, or a corporate charter dependent upon a State statute, is in question as to its construction or effect, the statute and the corporate charter must first be proven in the manner required by the Act of Congress, or in some other manner satisfactory to the State Court in which the trial is had. Thereupon, when the Court comes, as a matter of law, to construe such State statute and corporate charter, it will look to the decisions of the State Court, which may be given in evidence for this purpose to determine as matter of law the construction, meaning and effect of the State statute or of the corporate charter granted under it.

Bucher *v.* Cheshire Railroad Co., 125 U. S., 555, 582, 583.

Bailey *v.* Magwire, 22 Wall., 215, 230.

Renaud *v.* Abbott, 116 U. S., 277, 285, 286, 287.

Liverpool Steam Co. *v.* Phœnix Ins. Co., 129 U. S., 397, 445, 446, 447, 448, 449, 453 *et seq.*

Minor on Conflict of Laws, § 213.

We are impressed with the belief that the Court in its opinion and decision herein has overlooked the fact that this contract of corporate membership is a contract made and performable in New York; that it is a contract of corporate membership under the coporation laws of New York relating to corporations of this particular class; that these laws have been given in evidence in connection with the corporate charter and by-laws; that the construction of these laws by the Courts of New York has been shown by the decisions of those courts given in evidence; that this constitutes the proof of the laws of New York required by the Federal Statutes and

the Constitution of the United States, and such proof having been made in conformity with the Constitutional requirements it necessarily follows that in order to give full faith and credit to such laws they must be given the same meaning and effect that they have in the State of New York. This, the decision of the Referee and of the Court below denied to the plaintiff in error. Wherefore, we submit that the decision in this case should be for the plaintiff in error and not for the defendant, and this we think the following authorities will conclusively establish:

O'Malley *v.* People's Assn., 92 Hun (N. Y.), 572.
House *v.* Eastern B. & L. Assn., 52 App. Div. (N. Y.), 163.
Heslin *v.* Eastern B. & L. Assn., 61 App. Div. (N. Y.), 458.
Englehardt *v.* Fifth Ward Assn., 148 N. Y., 281.
People *v.* Lowe, 117 N. Y., 175.
Tilley *v.* American B. & L. Assn., 52 Fed., 618, 622.
Campbell *v.* Eastern B. & L. Assn., 98 Va., 729.
Eastern B. & L. Assn. *v.* Snyder, 98 Va., 710.
Bennett *v.* Eastern B. & L. Assn., 177 Pa. St., 233.
Miller *v.* Eastern B. & L. Assn. (Tenn.), 53 N. W. Rep., 231.

For these reasons, and upon the authorities cited, we most respectfully submit that a rehearing should be granted in this case.

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WM. BEVERLY WINSLOW,
Counsel for Petitioner.